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In the Supreme Court of the United States

October Term, 1925

No. 295

Henry P. Keith, Late Collector of United States Internal Revenue for the First Collection District of New York, Petitioner

v.

Emma B. Johnson, as Administratrix of the Goods, Chattels, and Credits Which Were of John G. Johnson, deceased

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

OPINIONS IN THE COURTS BELOW

The opinion of the United States District Court for the Eastern District of New York, is reported in 294 Fed. 964, and is found in the Record at pages 10 to 14. The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 3 F. (2nd) 361, and is found in the printed Record at pages 17 to 20.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered by the District Court for the Eastern District of New York September 26th, 1923 (R. 9). It was affirmed by the Circuit Court of Appeals for the Second Circuit November 28th, 1924 (R. 20). Certiorari was granted by this Court March 23rd, 1925 (R. 21) (267 U. S. 590), under Section 240, Judicial Code (c. 231, 36 Stat. 1087, 1157), as it stood before the Act of February 13, 1925 (c. 229, 43 Stat. 936), became effective (May 13, 1925).

STATEMENT

The question

The question presented by this record is whether or not, in calculating net taxable income for 1917, inheritance taxes paid to the State of New York are deductible from the gross income of a decendent's estate in the process of settlement under the provisions of Section 5 (a) (3) of the Revenue Act of 1916, as amended by Section 1201 of the Revenue Act of 1917.

FACTS

The complaint, the allegations of which were admitted by demurrer, shows (R. 2–5) that John G. Johnson died March 24, 1917, a resident of Kings County, New York. He left a large estate, from which the administratrix received between March 26, 1917, and December 31, 1917, a net income of $164,958, calculated without deducting from gross income the inheritance taxes listed below. The Fed-

eral income tax upon this income amounted to $30,985.53. The administratrix during the period from March 26, 1917, to December 31, 1917, paid the following inheritance taxes:

June 27, 1917, to State of Colorado	$286. 72
June 29, 1917, to State of West Virginia	232. 59
Sept. 4, 1917, to State of Kentucky	208. 24
Sept. 20, 1917, to State of New York	233, 044. 20
Sept. 20, 1917, to State of New Jersey	39, 201. 18
Total	273, 092. 94

The administratrix on or about the 28th day of March, 1918, filed an income tax return for the estate of John G. Johnson, covering the period beginning March 26, 1917, and ending December 31, 1917. She contended then, as now, that the above-mentioned inheritance taxes were deductible from gross income of the estate. However, complying with the regulations of the Treasury Department, the administratrix did not take the deductions in the return. She paid the tax under protest and duress. Thereafter a claim for refund was filed. It is claimed that the amount of inheritance taxes paid was deductible by the estate and that since this payment was more than the entire income of the estate no income tax was payable. The Commissioner of Internal Revenue failed to act on the claim for refund within six months after the filing thereof, whereupon the administratrix instituted this suit for the recovery of the entire amount of income tax paid.

The parties have stipulated (R. 17):

> that the only question to be decided was whether a transfer tax paid to the State of New York is such a tax as should properly have been allowed as a deduction in computing the net income of the estate of John G. Johnson, deceased, for the period beginning March 24, 1917, and ending December 31, 1917, under the provisions of the Revenue Act of 1916 as amended and the Revenue Act of 1917 and any other United States Revenue laws, if any, in force and bearing upon the question at the time mentioned in the complaint.

The inheritance tax paid to the State of New York exceeds the net income on which the tax was assessed.

As the inheritance tax was paid during the period for which the income tax was assessed, and the taxpayer may have kept her books and made her return on a "receipts and disbursements" basis, there is involved in this case no question of the period within which the deduction should be taken, such as is involved in the *Yale and Towne Mfg. Co. case* (No. 420, No. 337) recently argued and submitted.

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. (R. 7.) The District Court overruled the demurrer and granted plaintiff's motion for judgment. (R. 8, 14.) The judgment of the District Court was affirmed by the Circuit Court of Appeals. (R. 20.)

STATUTES INVOLVED

Section 2 (b) of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 757) provides:

> Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: *Provided*, That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.
>
> Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting

which they make as such trustees or other fiduciaries.

Section 5 (a) (3) of the Revenue Act of 1916 (39 Stat. 756, 759) as amended by Section 1201 of the Revenue Act of 1917 (40 Stat. 300, 330), provides:

> SEC. 5. That in computing net income in the case of a citizen or resident of the United States—
>
> (a) For the purpose of the tax there shall be allowed as deductions—
>
> Third. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes) or of its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits; * * *

The material portions of Article X, New York Tax Law, are set out in Appendix "A."

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

First. That the Circuit Court of Appeals erred in affirming the judgment of the District Court overruling the demurrer interposed by the defendant and granting judgment for the plaintiff on the pleadings.

Second. That the court below erred in ruling that the amount paid by the plaintiff to the State of New York for inheritance tax should have been allowed as a deduction in determining the income tax to be paid by the plaintiff.

SUMMARY OF THE ARGUMENT

This Court has decided that taxes which are deductible from the income of an estate for the purpose of determining net income taxable under the Federal Income Tax Act, are those taxes which are "charges against the estate" and are "to be paid out of it by the administrator or executor substantially as other taxes and charges are paid."

This Court has also held that the transfer tax imposed by the State of New York is not a charge against the estate, but is a charge against the beneficiaries.

Furthermore, the New York tax is not paid by the personal representative of the decedent out of the mass of the property before distribution, as other taxes are paid, but is paid out of the particular shares after those shares have been determined.

Therefore a tax which is not imposed upon the estate is not deductible from gross income of the estate for the purpose of determining net income taxable under the Federal Income Tax Act.

ARGUMENT

The question involved in this case turns upon a construction of Section 5 (a) (3) of the Revenue Act of 1916, as amended by Section 1201 of the Revenue Act of 1917, which allows a deduction from gross income of the amount of taxes paid by the taxpayer when imposed by the laws of a State. *The question is whether the transfer tax imposed by the State of New*

York is to be taken as a deduction by the beneficiaries upon whose shares such tax is imposed, or is it to be taken by the estate.

In the case of *New York Trust Company* v. *Eisner*, 256 U. S. 345, dealing with the computation of a Federal estate tax, this Court held that the New York transfer tax is not a charge against the estate, but is a tax on the right of the individual beneficiaries. Since that decision the Government has followed the rule there laid down and has allowed the deduction of the New York transfer tax to be taken by the beneficiaries in determining their net income for the purposes of Federal income taxation. It has not allowed the deduction to the estate. The respondent contends that the Government errs in following this rule and that the New York transfer tax is not what this Court has said it is, namely, a tax on the right of the beneficiaries, but is a tax on the estate, and is, therefore, to be deducted by the estate.

This Court, in the case of *United States* v. *Woodward* 256 U. S. 632, considered what constitutes a tax imposed and paid within the meaning of Section 214 (a) (3) of the Revenue Act of 1918, which is substantially the same as Section 5 (a) (3) of the Revenue Act of 1916 under which the instant case arises. In that case the question was whether the Federal estate tax was deductible in the Federal income tax return of the estate. This Court said (p. 633):

> The sole question for decision is, was the estate tax paid by the executors, and claimed

by them as a deduction in the income tax return for the year 1918, an allowable deduction in ascertaining the net taxable income of the estate for that year? The Court of Claims held that it was. 56 Ct. Clms. 133.

The solution of the question turns entirely upon the statutory provisions under which the two taxes were severally collected. The Act of 1918, by sections 210, 211 and 219, subjects the net income "received by estates of deceased persons during the period of administration or settlement" to an income tax measured by fixed percentages thereof; by sections 212 and 219 requires that the net income be ascertained by taking the gross income, as defined in section 213, and making the deductions named in section 214, and by section 214 makes express provision for the deduction of "taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes." This last provision is the most important one here. It is not ambiguous, but explicit, and leaves little room for construction. The words of its major clause are comprehensive and include every tax which is charged against the estate by the authority of the United States. The excepting clause specifically enumerates what is to be excepted. The implication from the latter is that the taxes which it enumerates would be within the major clause were they not expressly excepted, and also that there was no purpose to except any others. Estate taxes were as well known at the time the provision was framed as the ones par-

> ticularly excepted. Indeed, the same act, by sections 400–410, expressly provides for their continued imposition and enforcement. Thus their omission from the excepting clause means that Congress did not intend to except them.
>
> The Act of 1916 calls the estate tax a "tax" and particularly denominates it an "estate tax." This Court recently has recognized that it is a duty or excise and is imposed in the exertion of the taxing power of the United States. *New York Trust Co.* v. *Eisner* [256 U. S. 345]. It is made a charge on the estate and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid.

From this decision it is apparent that Section 5 (a) (3) of the Revenue Act of 1916 allows a deduction of "every tax which is charged against the estate" and which "is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid." The question then resolves itself into this: Are the transfer taxes imposed by the State of New York charges against the estate paid out of it by the administrator or executor substantially as other charges and taxes are paid?

It will be observed that the New York tax (1) is not a charge against the estate but is a charge against the particular shares of the beneficiaries, and (2) is not paid by the executor or administrator substantially as other taxes and charges are paid, but is

paid by the executor or administrator out of funds furnished, not by the estate, but by the beneficiaries.

That this "transfer tax" imposed by New York is not a charge against the estate, has been definitely decided by this Court in the case of *New York Trust Company* v. *Eisner*, 256 U. S. 345. In that case the question was whether the New York tax was properly to be deducted from gross estate for the purpose of determining the net estate subject to the Federal estate tax imposed by the Revenue Act of 1916. That Act provided that there shall be deducted from the gross estate "such amounts for funeral expenses, administration expenses, claims against the estate * * * and such other charges against the estate, as are allowed by the laws of the jurisdiction" under which the estate is being administered (Section 203 (a) (1)). This Court held that the New York tax was not "a charge against the estate," and was not within the language of the above section which expressly includes every payment made by the estate. The Court said (p. 350):

> "Charges against the estate" as pointed out by the court below are only charges that affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries. This reasoning excludes not only the New York succession tax but those paid to other States, which can stand no better than that paid in New York.

The language of the court below thus referred to is as follows (*New York Trust Company* v. *Eisner*, 263 Fed. 620, 622):

> If this [the Federal Estate Tax] were a tax on the right of succession, an intention to tax only that which eventually passes to a beneficiary would be presumed. But, as a tax on the cessation of decedent's interest, such a presumption would extend at best to the entire net estate without deduction of any charges levied, not on it, but on the right or on the share of individual beneficiaries. What, then, are the "charges against the estate as are allowed by the laws of the jurisdiction" included in Clause G (*sic*)? Not *all* charges which under the laws an executor or administrator may or even must pay, whether for his own protection or otherwise, but only such charges, like all other deductions, which affect the estate as a whole, only charges against the estate.
>
> Estate taxes or probate duties levied by the state would fall within this clause. *Northern Trust Company* v. *Lederer* (D.C.), 257 Fed. 812. But taxes levied on the shares to be received by beneficiaries, reducing, not the estate, but the individual's share, can not be deemed a charge upon the estate merely because the duty, with the corresponding liability and right to account in respect thereto in his estate accounts, is imposed upon the executor or administrator to pay the tax before distributing the share itself. The nature of the tax, as a succession,

not an estate, tax, remains unchanged, despite the additional obligation thus imposed.

From the standpoint of the incidence of death duties, it is well recognized both in this country and in England that a difference exists between estate and probate duties on the one hand and legacy and succession duties on the other. This is clearly established by the cases of *Winans* v. *Atty. General*, (1910) Appeal Cases (House of Lords), 27, 30, 32, 37–38, 40–41, 47; *Knowlton* v. *Moore*, 178 U. S. 41, 48–49, 50–51, 68; and *Bugbee* v. *Roebling*, 94 N. J. Law, 438, 442–444, 111 Atl. 29, 31–32.

It was in virtue of the time-honored and thoroughly well established distinction between a death duty, such as the probate duty, the British estate duty, and the Federal estate tax, all of which fell or fall upon the estate as a whole, and legacy and succession taxes which do not so fall, that this Court held in *New York Trust Company* v. *Eisner*, *supra*, that the New York transfer tax was a tax "on the right of individual beneficiaries," and hence not a "charge" upon the "estate as a whole." This, too, constituted the distinction and the basis upon which the lower court rested its decision in the case of *New York Trust Company* v. *Eisner*, 263 Fed. 620, 622.

In affirming this decision, this Court, as did the court below, found it necessary to determine the nature of the taxes, the deduction of which was sought from the gross estate, and in so doing said (256 U. S. 345, 350):

> "Charges against the estate" as pointed out by the court below are only charges that

affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries.

The District Court in the case at bar does not explain why this holding is not conclusive. The Circuit Court of Appeals explains its refusal to follow this Court's decision in *New York Trust Company* v. *Eisner*, by saying (3 F. (2nd) 361, 362):

> *New York Trust Company* v. *Eisner*, 256 U. S. 350, held that the New York inheritance tax was not a deduction in calculating the Federal inheritance tax. That case turns on the meaning of Section 203 (a) (1) of the Act of 1916, especially the words "such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered." It is quite true that the reason given was that inheritance taxes were "taxes on the right of individual beneficiaries," and for that reason not "charges that affect the estate as a whole." Literally the first clause quoted contradicts *United States* v. *Perkins*, [163 U. S. 625], but the cases may be reconciled by understanding that the "charges" intended are only such as are imposed on the executor as successor *stricti juris*, like the income tax itself, and not such as arise because he must distribute the estate, as is the inheritance tax.

It is submitted that this reconcilation of the supposed inconsistencies of this Court overlooks the

Woodward case, *supra*, in which it is held that the Federal estate tax—which is a payment not imposed on the executor as successor *stricti juris* but arises "because he must distribute the estate"—is a charge against the estate. Furthermore, the holding of this Court in the *Eisner case* that the transfer taxes of New York were "taxes on the right of individual beneficiaries" and for that reason were not "charges that affect the estate as a whole" does not conflict with the decision in *United States v. Perkins*, 163 U. S. 625, and for two reasons.

In the first place the *Perkins case* arose under the New York law before it was amended in 1910 (Chapter 706, Laws of 1910, Section 221), while the *Eisner case* arose after that amendment. The effect of this amendment, as stated by Gleason and Otis (Inheritance Taxation, 1917 Edition, page 527; 1922 Edition, page 702) is:

> Heretofore all estates above $10,000 had been subject to tax on the *entire amount*. Under the act of 1910, an exemption was made to *each beneficiary* and the theory of the tax was also changed. Instead of being imposed upon the right to *transfer* it was imposed on the *right to receive*.

In the second place it was not necessary in the *Perkins case* to determine the nature of the New York tax. The question presented was whether it lay within the power of the State of New York to exact a tax in respect to a bequest made to the

United States. Mr. Justice Brown, delivering the opinion of the Court, said (p. 628):

> * * * the so called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. * * *

United States v. *Fox*, 94 U. S. 315, cited in the *Perkins case,* is an example of the right inherent in a State to regulate testate successions. There a statute of New York provided that a devise of lands situate in that State might be made only to natural persons and such corporations, created under the laws of that State, as were authorized to take by devise. A devise of lands situate in the State of New York having been made to the United States, this Court held it to be void, saying (p. 320):

> The power of the State to regulate the tenure of real property within her limits, and the

> modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted.

Possessing the right to regulate testate and intestate successions, the State may curtail, limit, or qualify that right by taxation; the succession depending, for its taking effect, upon the continuance of the permission of the State. Apposite in this connection is the following from the opinion in *Knowlton v. Moore*, 178 U. S. 41, 57, 58:

> The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of these words be accurately understood. They have been used where the power of a state government to levy a particular form of inheritance or legacy tax has in some instances been assailed because of a constitutional limitation on the taxing power. Under these circumstances, the question has arisen whether, because of the power of the State to regulate the transmission of property by death, there did not therefore exist a less trammeled right to tax inheritances and legacies than obtained as to other subject matters of taxation, and, upon the affirmative view being adopted, a tax upon inheritances or legacies for this reason has been spoken of as privilege taxation, or a tax on privileges. The conception, then, as to the privilege, whilst conceding fully that the occasion of the transmission or receipt of property by death is a usual

> subject of the taxing power, yet maintains that a wider discretion or privilege is vested in the States, because of the right to regulate. Courts which maintain this view have therefore treated death duties as disenthralled from limitations which would otherwise apply, if the privilege of regulation did not exist. * * * An illustration is found in *United States* v. *Perkins*, 163 U. S. 625, where the right of the State of New York to levy a tax on a legacy bequeathed to the Government of the United States was in part rested on the privilege enjoyed by the State of New York to regulate successions. * * *

In the *Perkins case* no necessity arose for determining whether the tax imposed by New York was an estate tax or a legacy or succession tax, for whichever kind it was the result would have been the same. This is made abundantly clear by the Court when it said (163 U. S. 630), "The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, *and it is only upon this condition that the legislature assents to a bequest of it.*" (Italics ours.) That the nature of the death duty under consideration in the *Perkins case* was unimportant, and that the decision would have been the same had it been concededly a legacy or succession tax, is further made manifest by the case of *Snyder* v. *Bettman*, 190 U. S. 249, where this Court held that the Federal legacy tax of 1898 was not a tax on the municipality by which the bequest was received. And whether the matter be viewed either in the light

of the prevailing or the dissenting opinion handed down in *Snyder* v. *Bettman*, the same conclusion necessarily ensues, namely, that the *Perkins case* would have been decided as it was decided irrespective of the nature of the tax. All that these cases hold is that a death duty of whatever kind is not imposed upon the recipient, but upon the transfer and is payable out of the property transferred. This is also the real holding in the case of *Prentiss* v. *Eisner*, 267 Fed. 16 (certiorari denied, 254 U. S. 647), where the Circuit Court of Appeals says that the New York tax requires "a contribution from the decedent's estate" as a condition upon which the right to transmit may be exercised. The point decided is, in the language of Mr. Justice Brown in the *Perkins case, supra*, that (p. 628):

> * * * the tax is not upon property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee.

It is true of all death duties that they are not upon property and that they are taken from the property before it passes to the legatee. But death duties must be classified with reference to the time when the property yields its contribution to the State. If the tax is taken, as ordinary debts of the decedent and administration expenses are taken, from the mass of the property before determining the distributable portion and the amounts of the several shares, it properly belongs to that class of

death duties to which estate taxes and probate duties belong, but if the tax is taken from the distributable portions or the several shares after the amounts thereof are determined, it properly belongs to that class of death duties to which succession and legacy taxes belong. This is pointed out in *Knowlton* v. *Moore*, 178 U. S. 41, where it is said (p. 66):

> Thus it can not be doubted that, in assessing the tax, the position of each separate legatee or distributee must be taken into view in order to ascertain the primary rate which the statute establishes. One of two things must arise. When the rate of tax is thus calculated upon the particular attitude to the deceased of each of the legatees or distributees, the sum of the tax must be deducted either from each particular legacy or from the mass of the whole personal estate. If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular legatee or beneficiary, since the share of such person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased. This being the case, no room would be left for the contention that the tax was imposed on the whole estate. On the other hand, if the whole sum of the taxation on all the shares, calculated on the basis of the relationship of each beneficiary and the amount received be deducted from the mass of the

estate, then, each recipient would pay only a proportion of the amount without reference to his relationship to the deceased. This would result in imposing the tax on the whole personal estate, and ratably distribute the burden among all the beneficiaries. But to reach this the entire classification, grading the rate of the tax by the degrees of relationship, would have to be disregarded. The dilemna, therefore, which is involved in the contention that the statute imposes the tax, not on each legacy or distributive share, but on the whole personalty, is this: If the tax is levied and collected according to the classifications in the statute, it is clearly on the legacy or distributive share. If, on the contrary, it is levied on the entire personal estate, then the classifications of the statute must be ignored and the construction be upheld which maintains that the act has classified the rate of tax by the relationship of the beneficiaries to the deceased, and has then disregarded the classification by collecting the tax wholly without reference to such relationship. This construction, besides eliminating a large portion of the text of the act, would do violence to its plain import, which is to make the rate of the tax depend upon the character of the links connecting those taking with the deceased.

The New York Court of Appeals has recognized that by its inherent nature the incidence of the New York tax is upon the separate shares and that in this respect it differs from the Federal estate tax. It is

upon this incidence and difference that the case of *Farmers' Loan & Trust Company* v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769, is based. In that case the court says (p. 498):

> Since we have construed the will as not containing any direction as to payment of any tax on property which does not pass under the will, it follows that the executor is bound to pay the entire Federal estates tax without right to reimbursement but he is entitled to reimbursement where he has paid the State taxes which are imposed upon the transfer of the trust estate to the beneficiaries and not upon the transfer of the decedent's estate as a whole upon his death.

The above case is significant as it was decided after the decision in *Home Trust Company* v. *Law*, 236 N. Y. 607, 142 N. E. 303.

This line of cases and the reasoning thereof also disposes of the contention that the New York tax is imposed upon the executor. The Court of Appeals of New York has held in the case of *In re Meyer*, 209 N. Y. 386, 103 N. E. 713, that (p. 388):

> The appraisal of the estate honestly and legally made and the nature of the bequests required that the transfer tax be fixed at \$297.08. It came to pass, within the administration of the estate, without fault or delinquency upon the part of the executor, that the estate yielded a value less than the expenses of its administration. Therefore, the executor did not receive or acquire any money

or property usable for the payment of the transfer tax. If he is not entitled to a final accounting and discharge from his office unless he shall produce a receipt for the payment of the transfer tax, he must pay it from his individual moneys or property although he has completely and honestly fulfilled the duties of his executorship. We think the Legislature did not intend or enact such result.

The mere fact that the executor must pay the tax in the first instance means nothing because the executor and the estate are reimbursed out of the property of the beneficiaries.

Furthermore, the New York tax is not paid "substantially as other taxes and charges are paid." Such charges are paid out of the total personalty prior to the allocation of that personalty to distributive shares or legacies. In other words, the amount for distribution is the personalty less debts and expenses, not the personalty less *tax*, debts, and expenses. This follows from the fact that the amount of the tax depends upon the amounts of the several shares and the status of the several beneficiaries.

The provisions of the State statute (section 224) relating to the payment of the New York tax likewise clearly show that the Legislature did not intend to enact and did not enact that the tax should be paid out of the funds of the estate before the distributive shares are determined. Its first concern was that the tax should be paid when due. It, therefore, provided that the executor should pay the tax and

that for the purpose of raising the necessary funds he should have power to sell so much of the decedent's property as should be necessary, "in the same manner as he might be entitled by law to do for the payment of the debts" of the decedent. Having thus protected the State, the Legislature proceeds to impose the burden of the tax upon the shares of the beneficiaries, whether such shares be personalty or realty. It makes each beneficiary personally liable for the tax on his share. It provides that the executor shall deduct the amount of the tax from the beneficiary's share of personalty, and if such share is not in money the executor is required to collect the tax thereon from the person entitled thereto and he can not be compelled to deliver the property until the beneficiary has paid the tax thereon. In the event that there are several succeeding estates in the same property, the court is empowered to apportion the tax amongst the several tenants and to determine the amount to be paid into the executor's hands by each of them. (Section 224.)

Manifestly these provisions are intended to impose and do impose the burden of this tax upon each beneficiary's share. They are entirely inconsistent with any idea that the burden of the tax is to fall upon the estate before the distribution. *Smith* v. *Browning*, 225 N. Y. 358, 122 N. E. 217. The statute further provides that in the event the estate proves insufficient to pay debts and the legatee is compelled

to refund a part of his legacy he is entitled to recover from the tax commission a pro rata part of the tax paid. (Section 226.) Manifestly, if the ultimate liability for the tax is upon the estate, and is not upon the legacy, the recovery of the overpaid tax would be by the executor as the representative of the estate and not by the legatee. In the case of *In re Gihon*, 169 N. Y. 443, 62 N. E. 561, the Court of Appeals of New York says (pp. 447, 448):

> Therefore, though the administrator or executor is required to pay the tax, he pays it out of the legacy for the legatee, not on account of the estate. * * * No one questions that where a legacy is given for a specified amount the tax must be deducted from the amount of the legacy and the balance only given to the legatee. A testator may direct that the tax on a particular legacy shall be paid out of his estate; nevertheless, in reality, the tax is still paid out of the legacy, the effect of the direction of the testator being merely to increase the legacy by the amount of the tax. * * * the full amount of the legacy is in law paid to the legatee and the deduction made from it and paid to the state or Federal government is paid on account of the legatee from the legacy which he receives.

Not only is it the clear intent of the law that the tax shall be taken from the distributive share, but also such in fact takes place in the operation as will be seen from the computation of the tax under various assumed circumstances made in Appendix C hereto. In every case it will be seen that the amount

for distribution is not decreased by the tax, although in certain cases the amount received by the beneficiary is decreased.

It is submitted that the New York Court of Appeals in *Home Trust Company* v. *Law*, 236 N. Y. 607, 142 N. E. 303, did not intend to overrule summarily and without discussion its own previous decisions and the decision of this Court to the effect that the New York tax is not a charge against the estate payable as debts and expenses are paid out of the estate before distribution, but is a charge against the respective shares of the beneficiaries. But if the court did so intend, and has settled the nature and incidence of the New York tax, that determination is not to be followed in this Court because it is subsequent to a construction of the same law of New York by this Court.

In *Carroll County* v. *Smith*, 111 U. S. 556, this Court says (p. 563):

> We have, however, considered the reasoning of the Supreme Court of Mississippi, in its opinion in the case of *Hawkins* v. *Carroll County* [50 Miss. 735], with the respect which is due to the highest judicial tribunal of a State speaking upon a topic as to which it is presumed to have peculiar fitness for correct decision, and, while we are bound to admit the carefulness and fullness of its examination of the question, we are not able to adopt its conclusions. On the contrary, we are constrained to follow the decision in *St. Joseph Township* v. *Rogers*, 16 Wall. 644, and adhere to the views expressed

> by this Court in *County of Cass* v. *Johnston*, 95 U. S. 360, in deciding the same question upon the construction of a provision of the Constitution of Missouri, which is identical with that of the Constitution of Mississippi under consideration. * * *

But, the fact that the New York transfer tax has been recognized in that State as a proper deduction from the gross income of the decedent's estate in determining the net income subject to the New York income tax, is no sufficient reason to warrant a like deduction here where a Federal question is involved, namely, whether such tax is a proper deduction in ascertaining the net income of the decedent's estate under the Federal income tax law. Thus, in *New Jersey* v. *Anderson*, 203 U. S. 483, where the question at issue was whether certain license fees imposed upon a corporation by the State of New Jersey were entitled, under the Federal bankrupt law, to preferential payment upon the bankruptcy of the corporation, Mr. Justice Day said (p. 492):

> The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, giving a preference to taxes, is a Federal question, of ultimate decision in this court.

The case at bar also involves a State tax, but whether it is such a tax that it is a proper deduction under the Federal income tax law is a question for the exercise of an independent judgment of the Federal

courts. Not only has this Court in *New York Trust Company* v. *Eisner, supra*, determined that the tax is a charge upon the right of the individual beneficiaries of the estate, and not on the estate as a whole, but, as already pointed out, both under the New York statute and the decisions of the court of last resort in that State—decisions rendered not only before but also since the decision in the *Home Trust Company case, supra*—the incidence of the tax is placed upon the separate shares, legacies and devises of the several beneficiaries, the executor or administrator being required either to deduct the tax from the legacies before making payment to the legatees, or to collect it from the heirs, devisees or the legatees of specific bequests, and being, as stated in the case of *In re Meyer, supra*, "in a sense, the collector for the State."

However, the *Home Trust Company case* is not inconsistent with the views of this Court, for in that case the question was whether the New York transfer tax could be deducted in computing the State income tax under a construction of the New York income tax law. The court held that it could be. It may be that under the New York income tax law a tax which falls upon the estate after determination of each share is deductible from gross income. But such a tax is not deductible from gross income under the Federal income tax act.

The Federal Act imposes an income tax upon the income received by the estate of a decedent during the process of administration. The tax is to be

assessed in the name of the fiduciary not because it is imposed on the fiduciary but for the purpose of identification and to distinguish it clearly on the collector's books from the tax on the decedent's income. By express words of the Act the tax is to be "taxed to the estate." (Sec. 2 (b) of the Revenue Act of 1916.) This estate is a legal entity separate and distinct from the decedent, from his executor, and from the beneficiaries severally or collectively. *Merchants' Loan & Trust Company v. Smietanka*, 255 U. S. 509; *Catherwood v. United States*, 290 Fed. 981. This entity is permitted to deduct for the purpose of determining its net income the amount of taxes paid when such taxes are imposed by the authority of any State. But it is incongruous to say that a tax is imposed upon an estate before distribution when the estate before distribution is not reduced by the payment of the tax. As shown by the examples set forth in Appendix C of this brief, the result of the payment of the New York tax is that the amount of the estate is not reduced by its payment. The tax, therefore, is not "imposed" upon the estate.

In *United States v. Railroad Company*, 17 Wall. 322, where Section 122 of the Internal Revenue Act of June 30, 1864, was involved this Court held that a tax is only "imposed" upon the person whose property is reduced by its payment. Section 122 provided that railroad and certain other companies specified "indebted for any money for which bonds * * * have been issued * * * upon which interest

is stipulated to be paid * * * shall be subject to and pay a tax of 5 per centum on the amount of all such interest." Under this Section the Court held that the tax of 5 per cent was not "imposed" upon the corporation, but was a tax upon the bondholder. In reaching this conclusion the Court said (p. 326):

> In the cases we are considering the corporation parts not with a farthing of its own property. Whatever sum it pays to the Government is the property of another. Whether the tax is 5 per cent. on the dividend or interest, or whether it be 50 per cent. the corporation is neither richer nor poorer. Whatever it thus pays to the Government, it by law withholds from the creditor. If no tax exists, it pays 7 per cent., or whatever be its rate of interest, to its creditor in one unbroken sum. If there be a tax it pays exactly the same sum to its creditor, less 5 per cent. thereof, and this 5 per cent. it pays to the Government. The receivers may be two, or the receiver may be one, but the payer pays the same amount in either event. It is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls on the creditor. He is the party taxed.

In the case at bar it was said by the court below (3 F. (2nd) 361, 362):

> We express no opinion as to the result in the cases of realty, where the executor is not the successor, or even in the case of specific legacies.

And there might well have been added, inasmuch as they fall in the same category as realty and specific legacies, property transferred in contemplation of, or intended to take effect in possession or enjoyment at or after, death, property held by the decedent and another with the right of survivorship, and property passing under a power of appointment. In all such cases the New York Transfer Tax is paid by the heir, the legatee of the specific bequest, the donee, the survivor, or the appointee, as the case may be, or, if paid by the executor in the first instance, he is entitled to reimbursement. Now the New York statute does not impose one kind of tax in respect to personalty not specifically bequeathed and a tax of another nature in respect to all other property, nor has any court in that State so much as suggested such a thing. Under the New York law the values of the properties passing to any one person are aggregated and the rates are graduated. Thus in a given case the aggregation may include the value of an *inter vivos* gift, devised realty, personalty specifically bequeathed, personalty passing under the residuary clause of the will, real and personal property held by the decedent and another as joint tenants, and appointed property. When to the aggregate value of all such property a graduated rate is applied a segregation of any part of the entire tax with the view of treating such part as having been levied in respect to any one of the properties would be a manifest impossibility, and equally im-

possible would be the conception that the transfer of certain of the properties were subjected to one kind of tax and the other to a tax having an entirely different nature or incidence.

In New York prior to the enactment of the State Act of April 2, 1925, but one kind of tax was imposed—whether the transfer be of realty or personalty. The Circuit Court of Appeals in the opinion below attempted to make a differentiation between the deductibility of the tax on the transfer of realty and on personalty. No such distinction is possible. All of the tax imposed by the State of New York is deductible or none of it is, and if the reasoning of the court below cannot be sustained in cases where the tax involves a transfer of realty, it cannot be sustained in any case.

Of course the Government does not contend that the imposition of a tax upon a part (or of several taxes upon all the parts) of an estate is not deductible. Thus a property tax on bonds being a part of the estate is deductible if paid by the estate.

The contention is that the tax *must reduce* the assets of the estate available for distribution, and that so long as the estate is entitled to reimbursement, as it is under the New York law, it is not in theory or in fact reduced by the payment. The Government does not contend that no one is entitled to the deduction, although this contention was made in the *Prentiss case, supra*, and the *Woodward case,*

supra. Since the *Woodward case* that theory is exploded and the Government grants to the beneficiaries the right to the deduction of the New York Transfer Tax since they are taxables, distinct from the estate, from whose property that tax is paid. This is thought to be in line with the well-settled principle that taxes are allowed as deductions only by those upon whom they are imposed. If any authority other than the statement of this Court in the *Woodward case, supra,* is required to sustain the proposition that the Federal Act contemplates the deduction of taxes only by the person who pays them, not in the sense of merely passing over the money but in the sense of bearing the burden of the imposition, such authority will be found in the long line of Federal cases holding that the mere duty to pay over a tax is not in itself sufficient to entitle a taxpayer to a deduction. *Northern Trust Company* v. *McCoach,* 215 Fed. 991; *National Bank of Commerce* v. *Allen,* 211 Fed. 743, 746, affirmed 223 Fed. 472, 477; *First National Bank* v. *McNeel,* 238 Fed. 559, 560; *Eliot National Bank* v. *Gill,* 218 Fed. 600, 601.

CONCLUSION

In view of this Court's decision in *New York Trust Company* v. *Eisner, supra,* it is submitted that the action of the Government in disallowing the deduction of the New York transfer tax from the gross income of the estate and allowing it to the respective

beneficiaries is in accordance with the correct rule and that the judgment of the court below should be reversed.

Respectfully submitted.

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DECEMBER, 1925.

Appendix A

Transfer Tax Law of the State of New York, being Article 10 of Chapter 62 of the Laws of 1909, as amended (Birdseye, Cumming & Gilbert's Consolidated Laws, vol 8, p. 8515 et seq.)

Sec. 220—

Taxable transfers.—A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

1. When the transfer is by will or by the interstate laws of this state of any intangible property, or of tangible property within the state, from any person dying seized or possessed thereof while a resident of the state.

2. When the transfer is by will or intestate law, of tangible property within the state or of any intangible property, if evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in any corporation, joint-stock company or association wherever incorporated or organized, except a corporation, foreign or domestic, or joint-stock company or association constituting, being or in the nature of a moneyed corporation, a railroad or transportation corporation, or a public service or manufacturing corporation as defined and classified by the laws of this state, and the property represented by such shares of stock, bonds, notes or other evidences

of interest consists of real property which is located, wholly or partly, within the state of New York, or of an interest in any partnership business conducted, wholly or partly, within the state of New York, in such proportion as the value of the real property of such corporation, joint-stock company or association, or as the value of the entire property of such partnership located in the state of New York bears to the value of the entire property of such corporation, joint-stock company or association or partnership, and the decedent was a nonresident of the state at the time of his death; or when the transfer is by will or intestate law of capital invested in business in the state by a non-resident of the state doing business in the state either as principal or partner.

3. Whenever the property of a resident decedent, or the property of a non-resident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided pro rata among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will.

4. When the transfer is of intangible property, or of tangible property within the state, made by a resident, or of tangible property within the state or of any intangible property, if evidenced by, or consisting of shares of stock, bonds, notes or other evidences of interest in any corporation, joint-stock company or association wherever incorporated or organized, except a corporation, foreign or domestic, or joint-stock company or association constituting, being or in the nature of a moneyed corporation, a railroad or transportation corporation, or a public service or manu-

facturing corporation as defined and classified by the laws of this state, and the property represented by such shares of stock, bonds, notes or other evidences of interest consists of real property which is located, wholly or partly, within the state of New York, or of an interest in any partnership business conducted, wholly or partly, within the state of New York, in such proportion as the value of the real property of such corporation, joint-stock company or association, or as the value of the entire property of such partnership located in the state of New York bears to the value of the entire property of such corporation, joint-stock company or association or partnership made by a non-resident or capital invested in business in the state by a non-resident of the state doing business in the state either as principal or partner by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death.

5. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer whether made before or after the passage of this chapter.

6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.

7. Whenever property is held in the joint names of two of more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will.

8. The tax imposed hereby shall be upon the clear market value of such property, at the rates hereinafter prescribed.

Sec. 221—

Exceptions and limitations.—Any property devised or bequeathed for religious ceremonies, observances or commemorative services of or for the deceased donor, or to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, wherever incorporated, including corporations organized exclusively for bible or tract purposes and corporations organized for the enforcement of laws relating to children or animals, or real property to a municipal corporation in trust for a specific public purpose, shall be exempted from and not subject to the provisions of this article. There shall also be exempted

from and not subject to the provisions of this article personal property other than money or securities bequeathed to a corporation or association wherever incorporated or located, organized exclusively for the moral or mental improvement of men or women or for scientific, literary, library, patriotic, cemetery or historical purposes or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more such purposes. There shall also be exempted from and not subject to the provisions of this article all property or any beneficial interest therein so transferred to any father, mother, husband, wife, widow or child of the decedent, grantor, donor or vendor if the amount of the transfers to such father, mother, husband, wife, widow or child is the sum of five thousand dollars or less; but if the amount so transferred to any father, mother, husband, wife, widow or child is over five thousand dollars, the excess above these amounts, respectively, shall be taxable at the rates set forth in the next section.

Sec. 221-a—

Rates of tax.—1. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five thousand dollars, to any father, mother, husband, wife, or child of the decedent, grantor, donor or vendor, or to any child adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars to any lineal descendant of the decedent, grantor, donor or vendor, born in lawful wedlock, the tax on such transfers shall be at the rate of

One per centum on any amount up to and including the sum of twenty-five thousand dollars;

Two per centum on the next seventy-five thousand dollars or any part thereof;

Three per centum on the next one hundred thousand dollars or any part thereof;

Four per centum on the amount representing the balance of each individual transfer.

2. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars or more, to a brother, sister, wife or widow of a son, or the husband of a daughter of the decedent, grantor, donor or vendor, or to any child to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, the tax on such transfers shall be at the rate of

Two per centum on any amount up to and including the sum of twenty-five thousand dollars;

Three per centum on the next seventy-five thousand dollars or any part thereof;

Four per centum on the next one hundred thousand dollars or any part thereof;

Five per centum on the amount representing the balance of each individual transfer.

3. Upon all transfers taxable under this article of property or any beneficial interest therein of an amount in excess of the value of five hundred dollars, to any person or corporation other than those enumerated in paragraphs one and two of this section the tax on such transfers shall be at the rate of

Five per centum on any amount up to and including the sum of twenty-five thousand dollars;

Six per centum on the next seventy-five thousand dollars or any part thereof;

Seven per centum on the next one hundred thousand dollars or any part thereof;

Eight per centum on the amount representing the balance of each individual transfer.

Sec. 221-b—

Additional tax on investments in certain cases.

Sec. 221-c—

Exemption of certain personal property.

Sec. 222—

Accrual and payment of tax.—All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market

value thereof can not be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. Such tax shall be paid to the state comptroller in a county in which the office of appraiser is salaried, and in other counties, to the county treasurer, and said state comptroller or county treasurer shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment as provided in section two hundred and thirty-six.

Sec. 223.—

Discount and interest.—If such tax is paid within six months from the accrual thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accrual thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged; provided, however, that whenever the payment of any tax imposed by this article and payable to a county treasurer has been heretofore or shall be hereafter tendered, through inadvertence, to the state comptroller within the period of time before interest attaches to said tax, if such tax is paid in full to the treasurer of the proper county within ten days thereafter, the county treasurer, when directed so to do

by the state comptroller, may receipt in full for such tax without collecting any interest imposed thereon by this section of the tax law.

Sec. 224.

Lien of tax and collection by executors, administrators and trustees. Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might

be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

Sec. 225—

Refund of tax erroneously paid.—If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the state comptroller or county treasurer; or if such tax has been paid to such state comptroller or county treasurer, such officer shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed by the surrogate having jurisdiction within two years from and after

the date of entry of the order fixing the tax, or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law on due notice to the state comptroller, the state comptroller shall, if such tax was paid in a county in which the office of appraiser is salaried, refund to the executor, administrator, trustee, person or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in his hands or custody to the credit of such taxes, and to credit himself with the same in the account required to be rendered by him under this article, or if paid in a county in which the office of appraiser is not salaried, he shall by warrant direct and allow the county treasurer of the county to refund such amount in the same manner; but no application for such refund shall be made after one year from such reversal or modification, unless an appeal shall be taken therefrom, in which case no such application shall be made after one year from the final determination on such appeal or of an appeal taken therefrom, and the representatives of the estate, legatees, devisees or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund, and the state comptroller shall deduct from the fees allowed by this article to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted. This section, as amended, shall apply to

appeals and proceedings now pending and taxes heretofore paid in relation to which the period of one year from such reversal or modification has not expired when this section, as amended, takes effect.

Sec. 226—

Taxes upon devises and bequests in lieu of commissions.

Sec. 227—

Liability of certain corporations to tax.—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the state comptroller or the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who was a resident or nonresident, or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery or transfer be served upon the state comptroller at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, cor-

poration, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to, or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, under the provisions of this article, unless the state comptroller consents thereto in writing. And it shall be lawful for the said state comptroller, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto, a penalty of not less than five or more than twenty-five thousand dollars; ,and the payment of such tax and interest thereon

or of the penalty above prescribed, or both, may be enforced in an action brought by the state comptroller in any court of competent jurisdiction.

Sec. 228—

Jurisdiction of the surrogate.

Sec. 229—

Appointment of appraisers, stenographers and clerks.

Sec. 230—

Proceedings by appraiser.

Sec. 231—

Determination of surrogate.

Sec. 232—

Appeal and other proceedings.

Sec. 233—

Composition of transfer tax upon certain estates.

Sec. 234—

Surrogate's assistants in New York, Kings and other counties.

Sec. 235—

Proceedings by district attorneys.

Sec. 236—

Receipts from county treasurer or comptroller.—One of the duplicate receipts issued for the payment of any tax under this article, as provided by section two hundred and twenty-two, shall be countersigned by the state treasurer if the same was issued by the state comptroller, and by the state comptroller if issued by any county treasurer. The officer so countersigning the same shall charge the officer receiving the tax with the amount thereof and affix the seal of his office to the same and return to the proper person; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the

provisions of this article unless he shall produce a receipt so sealed and countersigned, or a certified copy thereof. Any person shall, upon the payment of fifty cents to the officer issuing such receipt, be entitled to a duplicate thereof, to be signed, sealed and countersigned in the same manner as the original.

Any person shall, upon the payment of fifty cents, be entitled to a certificate of the state comptroller that the tax upon the transfer of any real estate of which any decedent died seized has been paid, such certificate to designate the real property upon which such tax is paid, the name of the person so paying the same, and whether in full of such tax. Such certificate may be recorded in the office of the county clerk or register of the county where such real property is situate, in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

Sec. 237—

Fees of county treasurer.

Sec. 238—

Books and forms to be furnished by the state comptroller.

Sec. 239—

Reports of surrogate and county clerk.

Sec. 240—

Reports of county treasurer.

Sec. 241—

Report of state comptroller, payment of taxes: refunds in certain cases. * * *

Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the state comptroller, in the counties wherein this

tax is payable direct to him, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate so much of the tax assessed upon such contingent remainders as represents the difference between the tax at the highest rate and the tax upon such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and the state comptroller or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state, to the credit of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller or the county treasurer shall turn over the amount so retained by him to the state treasurer as provided herein and by section two hundred and forty of this article, or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller or the county treasurer shall refund any excess of tax so held by him to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will. Executors or trustees of any estate may elect to assign to and deposit with the state comptroller or the county treasurer, bonds or other securities of the estate approved by the state comptroller, or the county treasurer, both as to the form of the

collateral and the amount thereof, for the purpose of securing the payment of the difference between the tax on said remainder at the highest rate and the tax upon said remainder which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and cash for the balance of said tax as assessed, which said bonds or other securities shall be held by the state comptroller, or the county treasurer, to the credit of said estate until the actual vesting of said remainders, the income therefrom when received by the state comptroller or the county treasurer to be paid over to the executor or trustee during the continuance of the trust estates and then to be finally disposed of in accordance with the ultimate transfer or devolution of said remainders as hereinbefore provided; and it shall be the duty of the executors or trustees of such estates to forthwith notify the state comptroller of the actual vesting of all such contingent remainders.

If any executor or trustee shall have deposited with the state comptroller, or the county treasurer cash or securities, or both cash and securities, to an amount in excess of the sum necessary to pay the transfer tax upon such contingent remainders at the highest rate as aforesaid, the excess of tax so deposited shall be returned to the executor or trustee, or if any executor or trustee shall have deposited with the state comptroller, or the county treasurer, cash or securities, or both cash and securities, to an amount less than is sufficient to pay the tax upon such contingent remainders as finally assessed and determined, the executor or trustee of said estate shall forthwith, upon the entry of the order determining the correct amount of tax due, pay to the state comptroller, or the county treasurer, whichever is

entitled under the provisions of this article to receive the tax, the balance due on account of said tax.

Sec. 242—

Application of taxes.

Sec. 243—

Definitions.—The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein passing or transferred to individuals or corporate legatees, devisees, heirs, next of kin, grantees, donees or vendees, and not as the property or interest therein of the decedent, grantor, donor or vendor and shall include all property or interest therein, whether situated within or without the state. The words "tangible property" as used in this article shall be taken to mean corporeal property such as real estate and goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt. The words "intangible property" as used in this article shall be taken to mean incorporeal property, including money, deposits in bank, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt. The word "transfer," as used in this article, shall be taken to include the passing of property or any interest therein in the possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words "county treasurer" and "district attorney," as used in this article, shall be taken to mean the treasurer or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-eight of this

article. The words "the intestate laws of this state," as used in this article, shall be taken to refer to all transfers of property, or any beneficial interest therein, effected by the statute of descent and distribution and the transfer of any property, or any beneficial interest therein, effected by operation of law upon the death of a person omitting to make a valid disposition thereof, including a husband's right as tenant by the curtesy or the right of a husband to succeed to the personal property of his wife who dies intestate leaving no descendants her surviving.

Sec. 244—

Exemptions in article one not applicable.

Sec. 245—

Limitation of time.

Appendix B

A comparison of the provisions of the Federal Income Tax Laws of 1916 and 1918 and the New York Income Tax Laws material to this action

FEDERAL ACT OF 1916, AS AMENDED	FEDERAL ACT OF 1918	NEW YORK LAW (Chap. 627, Laws 1919)
SEC. 2. (*b*) (1) Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, (2) and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, (3) and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: (4) *Provided*, That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.	SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including— (1) Income received by estates of deceased persons during the period of administration or settlement of the estate; (2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests; (3) Income held for future distribution under the terms of the will or trust; and (4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.	SEC. 365.—1. The tax imposed by this article shall apply to the income of estates or of any kind of property held in trust, including: a. Income received by estates of deceased persons during the period of administration or settlement of the estate; b. Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests; c. Income held for future distribution under the terms of the will or trust; and d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.
Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in	SEC. 219. (b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that there shall also be allowed as a deduction (in lieu of the deduction author-	2. The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in this article for individual taxpayers, except that ther shall also be allowed as a deduction any

any accounting which they make as such trustees or other fiduciaries.

ized by paragraph (11) of subdivision (a) of section 214) any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any corporation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraph (1), (2), or (3) of subdivision (a) the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

part of the gross income which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, or any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph d of subdivision one of this section the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

3. In cases under paragraphs a, b, and c of subdivision one, of this section, the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases, the estate or trust shall be allowed the same exemptions as are allowed to single persons under section three hundred and sixty-two, and in such cases an estate or trust created by a person not a resident and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under section three hundred and fifty-nine, subdivision three.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

4. In cases under paragraph (d) of subdivision one of this section and in the case of any income of an estate during the period of administration or settlement permitted by subdivision three to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the income of a beneficiary of such estate or trust not a resident shall be taxable only to the extent provided in section three hundred and fifty-nine, subdivision three, for individuals other than residents.

SEC. 1204. (1) That subdivisions (c) and (e) of section eight of such Act of September eighth, nineteen hundred and sixteen, are hereby amended to read as follows:

"(c) Guardians, trustees, executors, administrators, receivers, conservators, and all persons, corporations, or associations, acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title

SEC. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is $1,000 or over if single or if married and not living with husband or wife, or $2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is $1,000 or over or if any ben-

SEC. 369. Every fiduciary (except receivers appointed by authority of law in possession of part only of the property of a taxpayer) shall make under oath a return for the taxpayer for whom he acts, first, if the net income of such taxpayer is one thousand dollars or over if single, or if married and not living with husband or wife, or two thousand dollars or over if married and living with husband or wife, or second, if the net income of such taxpayer, if an estate or trust, is one

which apply to individuals. Such fiduciary shall make oath that he has sufficient knowledge of the affairs of such person, trust, or estate to enable him to make such return and that the same is, to the best of his knowledge and belief, true and correct, and be subject to all the provisions of this title which apply to individuals: *Provided*, That a return made by one of two or more joint fiduciaries filed in the district where such fiduciary resides, under such regulations as the Secretary of the Treasury may prescribe, shall be a sufficient compliance with the requirements of this paragraph: *Provided further*, That no return of income not exceeding $3,000 shall be required except as in this title otherwise provided.

Sec. 5. That in computing net income in the case of a citizen or resident of the United States—

(a) For the purpose of the tax there shall be allowed as deductions—

Third. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes) or of its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing

eficiary of such estate or trust is a nonresident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this Act shall be subject to all the provisions of this Act which apply to individuals.

Sec. 214 (a) That in computing net income there shall be allowed as deductions:

(3) Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes; or (b) by the authority of any of its possessions, except the amount of income, war-profits and excess profits taxes allowed as a credit under Section 222; or (c) by the authority of any State or Territory, or any county, school district, mu-

thousand dollars or over or if any beneficiary is a taxpayer other than a resident of the state, which return shall state specifically the items of the gross income and the deductions, exemptions and credits allowed by this article. Under such regulations as the comptroller may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the comptroller or collector in the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to taxpayers.

Sec. 360. *Deductions.* In computing net income there shall be allowed as deductions:

* * * *

3. Taxes other than income taxes paid or accrued within the taxable year imposed, first, by the authority of the United States, or of any of its possessions, or, second, by the authority of any state, or territory, or any county, school district, municipality, or other taxing subdivision of any state or territory, not including those

subdivision, of any State, not including those assessed against local benefits;

nicipality, or other taxing subdivision of any State or Territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed; or (d) in the case of a citizen or resident of the United States, by the authority of any foreign country, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; or (e) in the case of a nonresident alien individual, by the authority of any foreign country (except income, war-profits and excess-profits taxes, and taxes assessed against local benefits of a kind tending to increase the value of the property assessed), upon property or business;

assessed against local benefits of a kind tending to increase the value of the property assessed, or third, by the authority of any foreign government.

Appendix C

Let it be assumed that a decedent left personal property worth $55,000, and that his debts and the expenses of administration were $5,000.

If the decedent died intestate leaving a widow and a brother as his next of kin, the widow takes $2,000 more than one-half, or $26,000; the brother takes the remainder, or $24,000. (Sec. 98, Art. III, Decedent's Estate Law, N. Y. Cons. Laws.) Their respective share would be taxed thus:

Widow, $26,000 less $5,000, balance $21,000 taxed @ 1% = ... $210

Brother, $24,000 (which is more than $500), $24,000 taxed @ 2% = ... $480

If the tax were paid out of the estate, the widow's share would be $2,000 plus ½ of ($48,000 − $690) $47,310, or $2,000 + $23,655 = $25,655, and the brother's share would be ½ of $47,310, or $23,655. But as the law operates the widow receives $26,000 − $210, or $25,790, and the brother receives $24,000 − $480, or $23,520. (*In re Gihon*, 169 N. Y. 443, 62 N. E. 561; *Re Smith*, 85 Misc. 636, 149 N. Y. Supp. 24.)

If the property consisted in part of two certificates of stock each worth $24,000, the administrator would deliver one certificate and $1,790 to the widow and would deliver the other certificate to the brother after collecting from him $480.

If there is, in addition, realty worth $10,000 the widow takes her dower free from tax. (*Re Weiler*, 139 App. Div. 905, 124 N. Y. Supp. 1133.) The remainder

is taxed to the brother. (Sec. 87, Art. III, Decedent's Estate Law, N. Y. Cons. Laws.) If the widow's expectancy is such that the present value of the brother's remainder is $8,000, the tax on his share is not increased by 2% of $8,000, but is computed thus:

Brother, $24,000 plus $8,000, or $32,000, which is more than $500.

$25,000 taxable @ 2% =	$500
$7,000 taxable @ 3% =	$210
Total............	$710

This increase in the tax falls entirely upon the brother; none of it being borne by the widow. It will also be noted that the amount of tax attributable to the brother's remainder in the realty cannot be segregated and identified, for if the value of such remainder be included in the first $25,000, the tax in respect thereto would be $160 ($8,000 taxable at 2%), but if the last $7,000 be treated as a part of such value, the tax in respect to the remainder would be $230 ($1,000 taxable at 2%, and the remaining $7,000 taxable at 3%). Under the New York law no occasion exists for any segregation, or attempted segregation. On the contrary, there is an aggregation of the values of the several properties passing to each beneficiary, and then an application of the graduated rates. In this connection, see pages 31 and 32, *supra*.

In the case of testacy, the same principles are applied. A striking example of the effect of the tax arises where the residue is left to a charity. An "estate tax" reduces this residue (*Y. M. C. A.* v. *Davis*, 264 U. S. 47), but the New York tax does not reduce the residue; it is paid out of the "taxable shares."

The case of a will which provides that all the tax shall be paid out of the residue, is no exception to the rule. In such case the tax falls upon the residue not by the law, but by the will. The testator has merely increased the respective gifts, other than the residue, by the amount of the tax thereon. (*In re Gihon, supra.*)

O

No. [redacted] 295

In the Supreme Court of the United States

October Term, [redacted] 1925

Henry P. Keith, Late Collector of United States Internal Revenue for the First Collection District of New York, Petitioner

v.

Emma B. Johnson, as Administratrix of the Goods, Chattels, and Credits Which Were of John B. Johnson, Deceased

Reply to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Opposition Thereto.

SIDNEY V. LOWELL,
Attorney for Respondent,
189 Montague Street,
Brooklyn, N. Y.

In the Supreme Court of the United States

OCTOBER TERM, 1924

HENRY P. KEITH, LATE COLLECTOR OF United States Internal Revenue for the First Collection District of New York, Petitioner

v.

EMMA B. JOHNSON, AS ADMINISTRATRIX of the Goods, Chattels, and Credits Which Were of John B. Johnson, Deceased.

As to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

RESPONDENT APPEARS AND OPPOSES THE ISSUE OF CERTIORARI

REASONS WHY CERTIORARI SHOULD NOT ISSUE

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1. In the interest of speedy Justice the action of this Court upon the complementary side of the question at issue should be followed in refusing the writ and its delay. That is: the question being whether the New York State Inheritance Tax paid should be deducted from the Income received and allowed to the legatees or next of kin as may be or to the Estate authority making the payment, was decided adverse to the legatee in *Prentiss* v. *Eisner,* 267 Fed. R., pp. 16, 20, 21, in the Circuit Court of Appeals Second Circuit

and this Court refused to tie up the matter further and declined to issue its Certiorari.

Prentiss v. *Eisner,* 254, U. S. 647.

2. Apart from justice to the individual the Country is entitled to a speedy settlement of such a question.

3. It is respectfully submitted that the position of the honorable appellant flies in the face of common sense in that it makes a claim of right to compel an Income tax when there was no net income. However ingenious the plea the law abhors such a claim.

BRIEF OPPOSING THE PETITION

There are three phases of these cases:

1. Whether Inheritance Taxes paid are allowable out of Income to anyone. That general point was clinched by this Court in the world known *Woodward Case.*

United States v. *Woodward,* 256 U. S. 632.

2. The next phase was who was to have the benefit of the allowance of the Inheritance tax paid. There could be but two claimants: The one who actually paid the tax, the other one someone claiming it was paid for him. The Circuit Court of Appeals, as before stated, decided against the person who did not make the payment—the ultimate legatee, and this Court refused to grant a Certiorari as to the decision.

Prentiss v. *Eisner,* 267 Fed. 16, 21.
Prentiss v. *Eisner,* 254 U. S. 647.

3. The next—and it is most respectfully claimed should be the final phase, was the specific adjudication by the New York Courts that the New York Inher-

itance Tax was deductible by the estate for the purposes of the New York Income tax. That decision following the Woodward case and further deciding that the New York Inheritance Tax (called Transfer Tax) and the Federal Inheritance Tax (called Estate Tax) were in their nature and purpose the same.

> *Home Trust Company* v. *Law*, 204 App. Div. 590.
> *Affirmed Court of Appeals*, 236 N. Y. 607.

This Court has, particularly as to rules of taxation, not been inclined to lay down different constructions of State law than those as adjudicated in the State Courts of last resort.

> *This Court* (opinion by HOLMES, Justice).
> *People ex rel Clyde* v. *Gilchrist*, 262 U. S. 94, 97.

The Petitioner tries to jump out of the shoes carefully fitted to this case by all the Courts by claiming in effect that the Federal Inheritance tax is altogether another thing in operation than the New York tax because it is called an "Estate" tax while the New York act is called a "Transfer" Tax Act. That is merely an acrobatic attempt. Decisions are not so limber. They are made of stouter stuff.

THE CASE GENERALLY

The clear Opinions written in the Courts below make the whole question plain. While the Petitioner is without a single one on the point.

> *Johnson* v. *Keith*, 294 Fed. 964.
> *Keith* v. *Johnson*. See Opinion annexed.

The Northern Trust Company and other bank and Corporate Stock cases now put forward as if on a new theory have been cited in this case right along and no Court has considered them as even worth discussion. In those cases the tax was distinctly imposed on the stockholders individually. Then the outstanding feature in them was whether the corporation *or* the stockholder was entitled to deduct the tax, whereas here the question is whether the estate paying the tax may deduct the same or whether no one can deduct it.

LASTLY. It does not lie in the Petitioner's mouth to complain that the Opinion in the Circuit Court of Appeals below does not go far enough. Its moderation in restricting its application to the circumstances of the case ought not to shock him.

As a matter of fact the "uncertainty" and question of rates of tax, &c., are all in the way he flashes his lights. There are no fancy rates. The tax is a plain, hard fact on strong lines. It does not dance about. This claim is all a clear case of spectacular art.

The threat also that other cases may be affected by the decision in this case should be impotent. Of course that is so. If they arise under the same law, why should the claimants not recover back the money of which they were illegally deprived and which they have been kept out of for weary years; and all from endeavors to elude the effect of the decision of this Court in the Woodward case?

In line with the Prentiss case precedent as well as for other good reasons the writ should be refused.

SIDNEY V. LOWELL,
Attorney for Respondent.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

HENRY P. KEITH, LATE COLLECTOR OF United States Internal Revenue for the First Collection District of New York,
Plaintiff-in-Error
(Defendant below)

against

EMMA B. JOHNSON, AS ADMINISTRATRIX of the Goods, Chattels and credits Which Were of JOHN B. JOHNSON,
Defendant-in-Error
(Plaintiff below)

Before:

HOUGH and MANTON, *C.JJ.*
and
LEARNED HAND, *D.J.*

Writ of error to the District Court for the Eastern District of New York, CAMPBELL, D.J., upon a judgment on demurrer for the plaintiff in an action at law.

NELSON T. HARTSON,
For the Plaintiff-in-Error
(Defendant below)

SIDNEY V. LOWELL,
B. MAHLER and
HARRISON TWEED,
For Defendant-in-Error
(Plaintiff below)

LEARNED HAND, D.J.: The action is to recover from the Collector of Taxes the amount of a tax paid under protest. The defendant demurred to the complaint, the District Judge overruled the demurrer and gave judgment for the plaintiff.

The case was thus. The defendant died on March twenty-fourth, 1917, and the plaintiff, his administratrix, filed an income tax return for the period of her administration in that year, from March 26th to December 31st, deducting the inheritance tax paid to the State of New York, which extinguished the whole income. The deduction was disallowed and the plaintiff was taxed $30,985.53, which she was forced to pay. For the purposes of the case it is agreed that all the intestate's estate may be regarded as personal property.

Section 2 (b) of the Federal Revenue Act of 1916 declares that the income of decedent estates shall be subject to the income tax "and taxed to their estates * * * to be assessed to the executor or administrator." Section five of the same act provides that "in computing the net income in the case of a citizen or resident of the United States" there may be deducted "taxes paid within the year imposed * * * by the authority of any State," which must mean imposed on the citizen in question. Since there is no special section providing for deductions allowed to decedents' estates, this section must cover these as well as living persons. As Section 2 (b) assesses the tax against the executor personally, he is the "citizen or resident" of Section 5 who may deduct the State tax. The case at bar therefore turns on whether the New York Inheritance Tax is "imposed" on him. At least if it is so imposed, Section 5 covers him. That is a question of New York law and we are bound by the decisions of the New York Court of Appeals on that question.

The New York Inheritance tax is imposed by Section 220 of the Tax Law on "the transfer of property." This is ambiguous in respect of its incidents. but Section 224 enacts that the tax shall be "a lien

upon the property transferred and the executors * * * of every estate so transferred shall be personally liable for such tax until its payment." We think that in principle under this provision the tax is "imposed" on the executor, and that it was so ruled in *Home Ins. Co.* v. *Law*, 204 App. Div. 590, affirmed in 236 N. Y. 607. There the New York Inheritance Tax was allowed as a deduction from the New York Income Tax upon a decedent's estate, under Section 360 (subdivision 2), which follows verbatim Section five of the Federal Revenue Act of 1916. Section 365 (subdivision 2) of the New York Income Tax law requires the executor to make the return and Section 369 makes him "subject to all the provisions of this article which apply to taxpayers," one of which (Section 351-b), makes the tax a debt against the taxpayer. While the Court of Appeals wrote no opinion, it seems to us necessary to assume that they regarded the inheritance tax as "imposed" under Section 360 (subdivision 2), because that was the only section which allowed the deduction. If so "imposed," it must be a duty in personam, because the income tax, as has been shown, is a debt, and the inheritance tax, in form also a debt, could not well be deducted unless it was a debt likewise.

Our own decision in *Prentiss* v. *Eisner*, 267 F. R. 16, following *U. S.* v. *Perkins*, 163 U. S. 825, compels the same conclusion. There we held that a legatee might not deduct the New York Inheritance Tax from his income tax. If neither he nor the executor may do so, the tax must be solely in rem, a conclusion effectively answered by Section 224 above quoted. The defendant insists that the contrary is true, the New York Inheritance tax being levied on one entity and the Federal Income Tax on another, each being an "estate" of the

decedent differently conceived. It is true that the language of the statutes is not wholly clear, but we prefer to follow the customary categories while that course is left open to us. An executor is vested with the personalty of the decedent, and here we are dealing only with personalty. While it is true that the New York Inheritance Tax is made a lien, that may well be only for security, and in any event personal taxes normally create duties in personam, and the executor or administrator is the natural persona on whom to levy them.

U. S. v. *Woodward*, 256 U. S. 653, in effect holds the same thing. There the question was whether the Federal Inheritance tax was deductible from income under Section 214 of the Act of 1918, which was the same as Section five of the Act of 1916. The Federal Inheritance Tax was by Section 201 of the Act of 1916 imposed upon the transfer of the "net estate of every decedent." By Section 205 the executor must file the return, by Section 207 he must pay the tax and by Section 209 it is made a lien. Thus the Federal Inheritance Tax is like the New York Inheritance Tax unless there is a difference between Section 207 of the Act of 1916 and Section 224 of the New York Tax law. We think that to say that the executor "shall pay" the tax is the same thing as to say that he shall be "personally liable" for it.

N. Y. Trust Co. v. *Eisner*, 256 U. S. 350, held that the New York Inheritance Tax was not a deduction in calculating the Federal Inheritance Tax. That case turned on the meaning of Section 203 (a) (1) of the Act of 1916, especially the words "such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered." It is quite true that the reason given

was that inheritance taxes were "taxes on the right of individual beneficiaries" and for that reason not "charges that affect the estate as a whole." Literally the first clause quoted contradicts *U. S.* v. *Perkins*, supra, but the cases may be reconciled by understanding that the "charges" intended are only such as are imposed on the executor as successor stricti juris, like the income tax itself, and not such as arise because he must distribute the estate, as is the inheritance tax. There was reason to impute such a distinction to Congress, since the income tax is collected yearly while the inheritance tax is levied once and for all. Both sovereigns might well insist upon an exaction on the whole estate for the privilege of its transfer.

We express no opinion as to the result in the cases of realty where the executor is not the successor, or even in the case of specific legacies.

Judgment affirmed.